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Illinois *Register*

Rules of Governmental Agencies

Volume 23, Issue 09 — February 26, 1999

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Editor's Note: The Cumulative Index and Sections Affected Index will be printed on a quarterly basis. The printing schedule for the quarterly and annual indexes are as follows:

April 16, 1999 - Issue 16: Through	March 31, 1999
July 16, 1999 - Issue 29: Through	June 30, 1999
October 15, 1999 - Issue 42: Through	September 30, 1999
January 14, 2000 - Issue 3: Through	December 31, 1999 (Annual)

INTRODUCTION

The *Illinois Register* is the official state document for publishing public notice of rulemaking activity initiated by State governmental agencies. The table of contents is arranged categorically by rulemaking activity and alphabetically by agency within each category. The Register also contains a Cumulative Index listing alphabetically by agency the Parts (sets of rules) on which rulemaking activity has occurred in the current Register volume year and a Sections Affected Index listing by Title each Section (including supplementary material) of a Part on which rulemaking activity has occurred in the current volume year. Both indices are action coded and are designed to aid the public in monitoring rules.

Rulemaking activity consists of proposed or adopted new rules; amendments to or repealers of existing rules; and rules promulgated by emergency or peremptory action. Executive Orders and Proclamations issued by the Governor; notices of public information required by State statute; and activities (meeting agendas, Statements of Objection or Recommendation, etc.) of the Joint Committee on Administrative Rules (JCAR), a legislative oversight committee which monitors the rulemaking activities of State agencies; is also published in the Register.

The Register is a weekly update to the *Illinois Administrative Code* (a compilation of the rules adopted by State agencies). The most recent edition of the Code along with the Register comprise the most current accounting of State agencies' rules.

The Illinois Register is the property of the State of Illinois, granted by the authority of the Illinois Administrative Procedure Act [5 ILCS 100/1-1 et seq.].

REGISTER PUBLICATION SCHEDULE 1999

Issue #	Copy Due by 4:30 p.m.	Publication Date	Issue #	Copy Due by 4:30 p.m.	Publication Date
Issue 1	December 21, 1998	January 4, 1999 *	Issue 28	June 28	July 9
Issue 2	December 28	January 8	Issue 29	July 6 ***	July 16
Issue 3	January 4, 1999	January 15	Issue 30	July 12	July 23
Issue 4	January 11	January 22	Issue 31	July 19	July 30
Issue 5	January 19	January 29	Issue 32	July 26	August 6
Issue 6	January 25	February 5	Issue 33	August 2	August 13
Issue 7	February 1	February 16	Issue 34	August 9	August 20
Issue 8	February 8	February 19 **	Issue 35	August 16	August 27
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Issue 11	March 1	March 12	Issue 38	September 7 ***	September 17
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Issue 13	March 15	March 26	Issue 40	September 20	October 1
Issue 14	March 22	April 2	Issue 41	September 27	October 8
Issue 15	March 29	April 9	Issue 42	October 4	October 15
Issue 16	April 5	April 16	Issue 44	October 12 ***	October 22
Issue 17	April 12	April 23	Issue 43	October 18	October 29
Issue 18	April 19	April 30	Issue 44	October 25	November 5
Issue 19	April 26	May 7	Issue 45	November 1	November 12
Issue 20	May 3	May 14	Issue 46	November 8	November 19
Issue 21	May 10	May 21	Issue 47	November 15	November 29 *
Issue 22	May 17	May 28	Issue 48	November 22	December 3
Issue 23	May 24	June 4	Issue 49	November 29	December 10
Issue 24	June 1 ***	June 11	Issue 50	December 6	December 17
Issue 25	June 7	June 18	Issue 51	December 13	December 24
Issue 26	June 14	June 25	Issue 52	December 20	December 31
Issue 27	June 21	July 2	Issue 1	December 27	January 7, 2000

* Monday following a state holiday.

** Tuesday following a state holiday.

*** Since the state holiday is a Monday, the deadline is Noon on Tuesday.

POLLUTION CONTROL BOARD

NOTICE OF ADOPTED AMENDMENTS

1) **Heading of the Part: Hearings Pursuant to Specific Rules**2) **Code Citation: 35 Ill. Adm. Code 106**3) **Section Number:** 106.940 **Adopted Action:** New4) **Statutory Authority:** 415 ILLCS 5/52.3-2(c)5) **Effective Date of Amendments:** February 16, 19996) **Does this rulemaking contain an automatic repeal date? No**7) **Do these amendments contain incorporations by reference? No**8) **A copy of the adopted amendments, including any material incorporated by reference, is on file in the agency's principal office and is available for public inspection.**9) **Notice of Proposal Published in Illinois Register: September 4, 1998, 22 Ill. Reg. 15926**10) **Has JCAR issued a Statement of Objections to these amendments? No**11) **Differences between proposed and final version: In the table of contents, made the following changes:**

POLLUTION CONTROL BOARD

NOTICE OF ADOPTED AMENDMENTS

SUBPART K: IN VOLUNTARY TERMINATION OF PREBBERS-FOR ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSA'S).

Section	Purpose, Applicability
106.940	Definitions
106.942	Termination Under Section 52.3-4(b) of the Act
106.944	Who May Initiate, Parties
106.945	Statement of Deficiency, and Answer
106.946	Service
106.948	Notice of Hearing
106.950	Notice of Hearing
106.952	Deficient Performance
106.954	Board Decision
106.956	Burden of Proof
106.958	Motions, and Responses
106.960	Intervention
106.962	Continuances
106.964	Discovery, Admissions
106.966	Subpoenas
106.968	Settlement Procedure
106.970	Authority of Hearing Officer, Board Members and Board Assistants
106.972	Order and Conduct of Hearing
106.974	Evidentiary Matters
106.976	Post-Hearing Procedures
106.978	Relief After Subpart K
106.980	Entry of Final Order
106.982	Relief from Section 106.956

In the heading of Subpart K, made the following changes:

SUBPART K: IN VOLUNTARY TERMINATION OF PREBBRS-FOR ENVIRONMENTAL MANAGEMENT SYSTEM AGREEMENTS (EMSA'S).

In Section 106.940, made the following changes:

a) The purpose of this Subpart is to set forth the criteria and procedures under which the Board or the Agency may terminate for involuntary termination of an EMSA, as defined in Section 106.942 of this Subpart Part.

b) ~~This Subpart shall apply to all proceedings to involuntary terminate an EMSA entered into pursuant to Section 52.3 of the Act and 35-ill-Adm-Ed-1577-except as set forth in subsection (c) of this Section.~~

b) When the Agency terminates an EMSA under this Subpart Part is not applicable to any Sponsor that is subject to termination of an EMSA by the Agency pursuant to Section 52.3-4(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.

POLLUTION CONTROL BOARD

NOTICE OF ADOPTED AMENDMENTS

b) The statement of deficiency must shall contain:

- 1) The stated basis for the respondent's alleged deficient performance under as--provided--in Section 106.954(a) of this Subpart below;
- 2) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate constitute--violations--of--the provisions of the Act or regulations that apply applicable to the Pilot Project--Project--and that the EMSA does not address addressed--by--the--EMSA;
- 3) The dates, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate constitute--violations--of the EMSA; and
- 4) With respect to subsections (b)(1) through (b)(3) fefty--through fefty--fefty of this Section, the statement of deficiency must complain shall contain sufficient detail to advise the respondent of the extent and nature of the alleged violations to reasonably allow the respondent to prepare preparation--of a defense.

c) The respondent Respondent must file an answer within 15 days after of receipt of the statement of deficiency, unless the Board or the hearing officer extends the 15-day period for good cause. All material allegations of the statement of deficiency will complain shall be taken as admitted if not specifically denied by the answer, or if no answer is filed. Any facts that constitute constituting an affirmative defense that which would be likely to surprise the complainant by--surprise must be plainly set forth in the answer before prior--to hearing.

In Section 106.950, made the following changes:

- a) The Agency must serve a copy of the notice of filing and statement of deficiency shall either be--served personally on the respondent or the respondent's his authorized agent, or shall be--served by registered or certified mail with return receipt signed by the respondent or the respondent's the person who makes personal service, or by properly executed registered or certified mail receipt. The Agency must file proof of service of the notice of filing and statement of deficiency complain shall be--fitted with the Clerk immediately upon completion of service.
- b) The Agency and the respondent must serve hearing--notice--and--statement--of

POLLUTION CONTROL BOARD

NOTICE OF ADOPTED AMENDMENTS

deficiency, all motions and all other notices shall be--served personally, by First Class United States mail, with sufficient postage affixed thereto, or by overnight delivery by a nationally recognized courier service,"--and The Agency and the respondent must file 10 copies of the motions and notices shall be--fitted with the Clerk with proof of service.

- c) Service is presumed complete upon personal service, four days after deposit in the United States First Class mail, with sufficient postage affixed thereto, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

In Section 106.952, made the following changes:

- a) The Clerk will shall assign a docket number to each statement of deficiency filed--deposit--the--statement--of--deficiency--and--notice--in--the--Board--of--Officer--and--distribute--copies--to--each--Board--Member. Any hearing will shall be held not later than 60 days after the respondent files filing of the answer notice--and--statement--of--deficiency, subject to any extensions ordered under subsection (c) of this Section.
- b) The Chairman of the Board will shall designate a hearing officer Hearing--Officer and the Clerk will shall notify the parties of the such designation. The hearing officer Hearing--Officer may be a Member of the Board if otherwise qualified.
- c) The hearing officer Hearing--Officer, after reasonable efforts to consult appropriate--consititution with the parties, will shall set a time and place for hearing to be held within 60 days after the filing of the statement of deficiency. The Board or the hearing officer may the Board shall not extend the time for hearing if unless all parties agree to--the--extension or there are extreme and uncontrollable circumstances that warrant a warranting--the delay of hearing. The Board or the hearing officer may delay the hearing more than once. In each any--such event, the Board or the hearing officer will not shall grant no delay the of hearing for more than in--excess of 30 additional days.
- d) The hearing will shall be held in the county in which the pilot project pilot--project is located, or in another such other county that as the hearing officer designates for cause Hearing--Officer--shall--for stated--cause--designate.
- e) The hearing officer or the Clerk will Hearing--Officer--shall Give notice of the hearing, at least 30 days before the hearing, to the parties under in--accordance with Section 106.951(b) of this Subpart and to the public by public advertisement in a newspaper of general circulation in the county in which the pilot project is located Part.

POLLUTION CONTROL BOARD

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f) The Agency must ~~shall~~ give notice of each statement of deficiency complaint and hearing under Section 106.950(b) at least 10 days before the hearing to:

- 1) All stakeholders named or listed in the EMSA or otherwise involved in the development of the EMSA for the Pilot Project in accordance with Section 106.950(b); and
- 2) Any person who submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404, if less than 100 persons attended the public hearing on the respondent's EMSA as indicated by signatures on the attendance sheet or signature cards. The public hearing on the EMSA will be held in a newspaper or general circulation in the county in which the Pilot Project is located.

g) Failure to comply with the provisions of this Section is not section ~~may~~ ~~not~~ ~~be~~ ~~based~~ a defense to an involuntary termination action under this Subpart, but the hearing officer may postpone the hearing upon the motion of any person prejudiced by a failure to comply with this Section ~~any~~ person adversely affected by a such officer of competence may upon motion to the Hearing Officer have the hearing postponed if prejudice is shown.

In Section 106.954, made the following changes:

- a) For purposes of this Subpart, a respondent is the performance under its EMSA ~~or~~ a sponsor is deficient if the Agency asserts and the Board finds that any of the following conditions exist:
 - ↳ The respondent misrepresented the factual basis for entering into the EMSA ~~was~~ ~~misrepresented~~ by the sponsor.
 - 2↳ The respondent sponsor has failed to provide access to the pilot Project Pilot Project for the Agency to monitor compliance with an EMSA.
 - 3↳ The respondent sponsor has falsified any monitoring data, recordkeeping information or reports regarding the pilot project.
 - 4↳ The respondent sponsor or the owner or operator of the Pilot Project Pilot Project has failed to comply with any requirement one or more requirements of any federal or local environmental law or regulation that applies applicable to the Pilot Project and that the EMSA does not address Pilot Project and not addressed by the EMSA and for which a citizen's complaint has been filed with a court of competent jurisdiction or the appropriate authority has

POLLUTION CONTROL BOARD

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sent a notice of violation, complaint or other notice of failure to comply to the respondent sponsor or the owner or operator of the pilot project Pilot Project.

5↳ The respondent sponsor or the owner or operator of the Pilot Project Pilot Project has failed to comply with any requirement one or more requirements of any State environmental law or regulation that applies applicable to the Pilot Project and that the EMSA does not address Pilot Project and not addressed by the EMSA and for which a citizen's complaint has been filed with the Board and the Agency has mailed a notice of violation to the respondent sponsor or the owner or operator of the Pilot Project under Pilot Project pursuant to Section 31(a) or (b) of the Act.

6↳ The respondent sponsor or owner or operator of the Pilot Project has failed to comply with one or more provisions in its EMSA subject to any grace or cure periods or rights contained in the EMSA ~~therein~~.

b) Any Board finding of deficient performance under subsection (a)(4) or (a)(5) of this Section will not be binding for any purpose or in any other proceeding under the Act, other than under this Subpart.

In Section 106.956, made the following changes:

- a) The Board ~~will~~ shall prepare a written opinion and order for all final determinations that will ~~which~~ shall include findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law (supported by adequate reasoning) on all material issues.
- b) The Board will render its decision as expeditiously as practicable ~~shall~~ ~~order~~ ~~an~~ EMSA terminated if a sponsor does not respond to the Agency's statement of deficiency within the specified time. Such order shall be entered not later than 30 days after the filing of the petition.
- c) ~~if an~~ ~~an~~ ~~has been~~ ~~timely~~ ~~filed~~ ~~by~~ ~~a~~ ~~sponsor~~ ~~the~~ ~~Board~~ ~~will~~ ~~shall~~ ~~render~~ ~~a~~ ~~final~~ ~~decision~~ ~~as~~ ~~an~~ ~~order~~ ~~within~~ ~~30~~ ~~days~~ ~~after~~ ~~the~~ ~~hearing~~ ~~that~~ ~~either~~:

 - 1) Terminates the EMSA;
 - 2) Defers termination for a specified time, not to exceed 90 days from the date of the order ~~order~~, during which the respondent sponsor may rectify the deficient performance; or
 - 3) Rejects termination of the EMSA.

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Q. The Board may extend the time period under subsection (b)(2) of this Section for good cause.

d) The final Board opinion and may order may include any or all of the following:

- 1) Direct the respondent to direct to cease and desist from violating ~~violation~~ of the Act, of the Board's rules and regulations, or the provisions of the ENSA;
- 2) Require the respondent to provide the imposition of performance assurance compensation in each amounts as appropriate amounts in each case;

3) If the Board allows respondent an opportunity to come into compliance, the require the respondent to post a posting of sufficient performance bond or other security as provided by the Act or ENSA to assure that the respondent corrects the correction of such violation within the time that the Board prescribes prescribed; and

4) Enforce any remedy provision of the ENSA; and

5) ~~47~~ Order such other relief as order that may be appropriate.

e) The Clerk will shall publish the order and opinion with the vote of each Board Member and will shall notify the parties required to be notified of the hearing from which the order arose of the such order and opinion.

In Section 106.958, made the following changes:

The Agency has shall have the burden to prove of proving by a preponderance of the evidence, that there has been deficient performance under the ENSA, as set forth in Section 106.954(l) of this Subpart.

In the heading of Section 106.960, replaced "and" with a comma.

In Section 106.960, made the following changes:

- a) All motions before preliminary to a hearing must shall be presented to the hearing officer at least 10 days before prior to the date of the hearing.
- b) The complainant's motion Motions by complainant to voluntarily dismiss an action as to any or all claims must shall be directed to the Board and may be made orally upon the hearing record, or may be made in

POLLUTION CONTROL BOARD

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writing at any time before the Board issues its decision instance of the Board's decision.

c) All motions must be served on all parties, including the Agency and its representative and the hearing officer Hearing Officer designated by the Board, with proof of service.

d) Unless made orally on the record during a hearing or unless the hearing officer Hearing Officer directs otherwise, a motion must shall be in writing, must shall state the reasons for and grounds upon which the motion is made, and may be accompanied by any affidavits or other evidence relied on, and, when appropriate, by a proposed order.

e) Within 7 days after service of a written motion is served, or another such other period that the Board or hearing officer Hearing Officer may prescribe, the party may file a response to in support of or in opposition to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties will shall be deemed to have waived objection to the granting of the motion, but the such waiver of objection does not bind the Board in its determination. The moving party does shall not have the right to reply, except as permitted by the hearing officer Hearing Officer or the Board Dennis.

f) No oral argument will be heard on a motion before the Board unless the Board so directs otherwise. A written brief may be filed with a motion or an answer to a motion ~~setting~~ the arguments.

g) The hearing officer Hearing Officer may rule upon all motions, except that the hearing officer has no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, or for failure to state a claim, or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof.

h) No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer Hearing Officer.

i) After the hearing, the Board may review the hearing officer's rulings. The Board Rulings of the Hearing officer may be reviewed by the Board after conciliation of the hearing but will be set aside the hearing officer's ruling only to avoid material prejudice to the rights of a party. The hearing officer Hearing Officer, if a member of the Board, may vote upon motions to review his or her rulings as hearing officer Hearing Officer.

j) Unless the Board orders or this Subpart provides otherwise provided herein or ordered by the Board, the filing of a motion will shall not stay the proceeding or extend the time to perform for the performance of any act.

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In Section 106.962, made the following changes:

- a) Upon timely written application and subject to the need to conduct necessity-for-conducting an orderly and expeditious hearing, the hearing officer Hearing-Officer will shall permit any person who a person to intervene in an involuntary termination proceeding under this Subpart if the person submitted written comments on the respondent's EMSA or participated in the public hearing on the respondent's EMSA by signing an attendance sheet or signature card at hearing under the procedures set forth in as provided-in 35 Ill. Adm. Code 187.104 or is named or listed in the respondent's EMSA as a stakeholder, and if the Board's final order may adversely affect him or her is so-stated—that he—or—she—may—be adversely—affected—by a final—order—of—the—board—to—intervene—in—an involuntary—termination—proceeding.
- b) The applicant must file 10 gentle copies of a petition to intervene for intervention—shall be filed with the Board and the applicant shall also serve copies on each party not later than 48 hours before the date set-for hearing. The hearing officer Hearing-Officer may permit a person to intervene intervention at any time before the beginning of the hearing when that person shows good cause for the delay is—shown.
- c) An intervenor has shall—have all the rights of an original party, except that the intervenor is shall—be bound by orders therefore issued before the hearing officer permitted the intervenor to intervene and the intervenor cannot shall—not raise issues that which activity were raised or were required to be raised at an earlier stage of the proceeding.

In Section 106.964, made the following changes:

The hearing officer will grant a motion to continue an for continuation—for any involuntary termination proceeding under this Subpart when shall-be-granted-by-the-Hearing-Officer whenever justice may requires. All motions to continue for continuation must be supported by an affidavit or written motion before the hearing officer Hearing-Officer by the person or persons with hearing knowledge of the facts that support supporting the motion. However, if the Board determines—in-its-discretion that any involuntary termination proceeding under this Subpart is not providing expeditious concision, the Board may shall order such actions that as it deems appropriate to expedite the proceeding reach—an-expeditious concision.

In Section 106.966, made the following changes:

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a) Pre-trial—discovery Discovery, except requests to produce for production—of documents, admit facts admissions—of—facts and state the production—of the identity and location of persons with having knowledge of facts, as set forth in subsection (b) of this Section below, is shall not be permitted unless the hearing officer except—as agreed—to—by—all—parties—and—directed—pursuant—to—a—Hearing-Officer orders otherwise.

b) Regarding any matter not privileged, the hearing officer may Bearing Officer—shall order a party to produce requests-for-production-of documents and to state the production—of the identity and location of persons with having knowledge of facts upon the written request of any party when parties cannot agree on the legitimate scope of the such requests. It is not a ground for objection that the documents will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action.

c) The hearing officer may Hearing-Officer shall order a party:

- 1) To state the—production—of the identity and location of persons with having knowledge of relevant facts.
- 2) To produce the—production—of evidence that a party controls or possesses so that it may be inspected, copied or duplicated under the control—or—possession—of—any—party—for—the—purposes—of inspection—and—where—necessary—for—purposes—of—copying—or distribution. The order may grant this shall—include the right to reasonably inspect of reasonable—inspection—of the pilot project Pilot—project.

d) The hearing officer Hearing-Officer may at any time on his or her own initiative, or on motion of any party or witness, make a protective order as Justice requires. The protective order may deny, limit, condition or regulate denying—limiting—conditioning—or regulating discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the obtaining—such materials consistent with the provisions—of Sections 7 and 7.1 of the Act.

e) All objections to rulings of the hearing officer must Hearing—Officer shall be made in the record.

f) Section 35—III—Adm—Code 106.960(d), (e), (f), (g), (h), (i) and (j) of this Subpart applies shall apply regarding procedures to rule for ruling on objections.

g) Failure to comply with any ruling will shall subject the person to

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g) Failure to comply with any ruling will shall subject the person to

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sanctions under 35 Ill. Adm. Code 101, Subpart J, Pett-107.

h) Request to Admit Facts for Admissio[n] of Fact. A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency stating-of-the--complaint, a written request that ~~for--the--admission--by~~ the latter admit of the truth of any specified relevant fact set forth in the request.

i) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted to the party to whom the request is directed unless, within 15 days after service under subsection (h), or (i), of this section thereof, the party requesting the admission either a sworn statement upon the party requesting the admission or a sworn statement that denies denying specifically the matters on of which the admission is requested or that sets forth setting-forth in detail the reasons why the party he cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If a party objects in writing written-objection to a part of the request it demands, the consider of the request must ~~shall~~ be answered within the period designated in the request. A denial ~~must~~ shall fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, the party must nevertheless specify so much of it as is true and deny only the remainder. The hearing officer will hear any objection to a request or to an answer ~~shall--be--heared--by--the--hearing~~ Officer upon prompt notice and motion of the party making the request.

j) Effect of Admission. Any admission made ~~by--a--party--parent--to~~ request under this Section ~~section~~ is for the purpose of the pending action only. It does not constitute an admission by the party him for any other purpose and may not be used against ~~the~~ party him in any other proceeding.

k) Expenses of Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial in response to the request thereto, and if the party requesting the admissions ~~list~~ thereof proves the genuineness of the document or the truth of the matter of

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fact, the latter party he may apply to the Board for an order, under 35 Ill. Adm. Code 101, Subpart J, for payment of reasonable expenses incurred Partt-107.

In Section 106.968, made the following changes:

a) Upon any party's timely motion to the Board by-any-party, or on motion of the hearing officer, Hearing-Officer or the Board, the hearing officer, Hearing-Officer or the Board may shall issue a subpoena to attend for-attendance- a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolve ~~reconcile~~ ~~settle~~ the matter under consideration, subject to this Subpart's the limitations on discovery prescribed-by-the-Subpart. A copy of the subpoena shall be served upon the Clerk ~~see~~ board-ties. If the witness, other than a respondent employee or owner or operator of a pilot, project, is a non-resident of the State estate, the order may provide such terms and conditions regarding in-connection-with his or her appearance at the hearing that ~~as~~ are just, including payment of his or her reasonable expenses.

b) Every subpoena must shall state the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place therein specified.

c) The hearing officer, Hearing-Officer or the Board, upon motion made promptly and in any event at or before the time specified for compliance with the subpoena for-compliance-theeenth, may quash or modify the subpoena if it is unreasonable and oppressive.

d) Failure of any witness to comply with a Board subpoena will shall subject the witness to sanctions under 35 Ill. Adm. Code 101, Subpart J, Partt-107.

In Section 106.970, made the following changes:

e) All parties to any case in which a settlement or compromise is proposed must shall file with the Clerk before Hearing-Officer at the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, that outlines obtaining the nature of, the reasons for, and the purpose to be accomplished by, the settlement. The such statement must shall contain:

- 1) A full stipulation of all material facts that, pertain pertaining to the nature, extent and causes of the alleged violation;
- 2) The nature of the relevant parties' operations and control equipment;

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- 3) Any explanation for past failures to comply and an assessment of the impact on the public from the failure to comply ~~each~~ ~~noncompliance~~;
- 4) Details about ~~several~~ future Plans for compliance, including a description of additional control measures and the dates on which they will be implemented ~~for-their-implementation~~; and
- 5) The proposed performance assurance payment, if any.

b) No-hearing-is-required-for-the-Board-to-dismiss-a-complaint-pursuant-to an if an agreed settlement is filed under this Section, the Board may dismiss the case without holding a hearing.

In Section 106.972, made the following changes:

- a) The hearing officer has ~~Bearing-Officer~~—~~has~~—~~never~~ the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. The hearing officer has ~~Re-~~~~or~~ ~~the~~ ~~heir~~—~~have~~ all powers necessary to these ends including, but not limited to, the authority to:
 - 1) Issue discovery orders;
 - 2) Rule upon objections to discovery orders;
 - 3) Make each protective orders as justice requires, which may deny, limit condition or regulate ~~denying~~ ~~limiting~~ ~~conditioning~~—~~or~~ ~~restricting~~ discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains ~~the~~ obtaining each materials;
 - 4) Administer oaths and affirmations;
 - 5) Rule upon offers of proof, and receive evidence and rule upon objections to introducing the introduction of evidence, subject to Section 106.974(b) of this Subpart;
 - 6) Regulate the course of the hearings and the conduct of the parties and their counsel;
 - 7) Examine witnesses solely to clarify ~~for-the--no--purposes--of~~ certifying the record ~~as established--by--the--parties--of~~ the hearing. When any party is not represented by counsel, the hearing officer Hearing-Officer may examine and cross-examine any witness to insure a clear and complete record. However, the hearing officer Hearing-Officer may not exclude exhibits or other

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testimony because ~~as--or--witness~~ of the ~~has~~ examination unless all parties ~~to~~ agree; and

- 8) Except as otherwise provided, consider and rule as Justice may require upon motions appropriate to an adjudicative proceeding.
- b) Any Board Member or assistant to the Board Member present at the hearing may advise the hearing Officer Hearing-Officer and may interrogate witnesses but does ~~not~~ have the authority to rule on objections or motions or to overrule the hearing Officer Hearing-Officer during the hearing.

In Section 106.974, made the following changes:

- a) The following will ~~shall~~ be the order of all involuntary termination hearings under this Subpart, ~~unless~~ modified by subject--to modification by the hearing officer Hearing-Officer for good cause:
 - 1) Present, argue and dispose ~~Presentation--argument~~ and disposition of preliminarily motions on ~~preliminary--to--a--hearing--on--the--merit~~ of the matters ~~that~~ raised in the statement of deficiency raises ~~complaint~~;
 - 2) Present ~~Presentation--of~~ opening statements;
 - 3) Complainant's case in chief;
 - 4) Respondent's case in chief;
 - 5) Complainant's case in rebuttal;
 - 6) Statements from interested citizens, as ~~authorized~~ by the ~~hearing~~ Officer authorizes Hearing Officer;
 - 7) Complainant's opening argument, which may include legal argument;
 - 8) Respondent's closing argument, which may include legal argument;
 - 9) Complainant's closing argument, which may include legal argument;
 - 10) Present and argue presentation and argument of all motions before submitting prior to submission of the transcript to the Board; and
 - 11) A schedule to submit for substitution of briefs to the Board.
- b) All hearings under this Subpart will ~~part--will~~ be public, and any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter of the hearing. Any

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Party may cross-examine any person who submits a statement submitting such a statement may be subject to cross-examination by any party. If the person is not available to be cross-examined upon timely request, the written statement may be stricken from the record. The hearing officer will hearing officer will not permit any person to offer reasonable oral testimony whether or not a party to the proceedings.

c) All witnesses will shall be sworn.

d) At the conclusion of the hearing, the hearing officer will hearing officer shall make a statement about as to the credibility of witnesses. This statement will shall be based upon the hearing officer's his legal judgment and experience and will shall indicate whether he or she finds credibility to be at issue in the case and if so, the reasons why. This statement will shall become a part of the official record and will shall be transmitted by the hearing officer hearing officer to each of the parties to—the—case. No other statement will shall be made or be appropriate unless the Board orders otherwise ordered by the Board.

c) In Section 106.976, made the following changes:

The provisions of 35 Ill. Adm. Code Sections 103.204 through 103.210 regarding admissible evidence, written narrative testimony, official notice, viewing of premises, admitting admissions of business records, examining adverse parties or agents and examination of adverse party or agent, hostile witnesses and compelling them to appear, experience thereof, and amendment and variance of pleadings and proof, will shall apply to proceedings under this Subpart.

In Section 106.976, deleted "Sections" and replaced "shall" with "will".

In the heading of Section 106.980, replaced "Subsequent to" with "After".

In Section 106.980, made the following changes:

Within 35 35 days after the Board adopts adoption of a final order, any party may file a motion to renew, modify or vacate for—rehearing or—modification of the order or—vacate—the—orders or for other relief. Response to the said motion must shall be filed within 14 14 14 days after the motion is filed from the filing thereof. A motion filed within 35 35 days stays enforcement of the final order.

In Section 106.982, made the following changes:

a) The Board may at any time correct errors in orders or other parts of the record and correct and errors in orders or other parts of the record

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that arises cheating—cheating from omission or omission of clerical mistakes, may be—detected—by—the—Board—at—any—time—of—the—Board—may do—no—on its own initiative or on the motion of any party and after each notice, if any, is the Board orders. During the pendency of an appeal, the Board may correct the such mistakes may be—re—corrected before the appeal is docketed in the appellate court, and—the—Board—may—white while the appeal is pending, the Board may correct the mistakes may be—re—corrected with leave of the appellate court.

- b) On motion and upon each terms that are just, the Board may relieve a party or a party's its legal representative from a final order, for the following:
 - 1) Newly discovered evidence that which by due diligence could not have been discovered in time under Section 106.956 or this Subpart; or
 - 2) StCFraud (whether Previously henceforth denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
 - 3) Void order.
 - c) A motion under this Section section does not affect the finality of a Board order or suspend the operation of a Board order. The motion must be filed in the same proceeding in which the Board entered the order was—entered but the motion is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties must to the motion shall be notified under as provided by Section 106.950(b) of this Subpart.
 - d) This motion must shall be filed with the Board within 60 30 days after entry of the order.
 - 12) Have all the changes agreed upon by the agency and JCAR been made as indicated in the agreements issued by JCAR? Yes
 - 13) Will these amendments replace an emergency rule currently in effect? No
 - 14) Are there any amendments pending on this Part? No
 - 15) Summary and Purpose of Amendments: For a more detailed discussion of the amendments please refer to the Illinois Pollution Control Board's opinion and order at first notice (August 20, 1998), its opinion and order at second notice (December 17, 1998) and its final opinion and order (February 4, 1998). Copies of these opinions and orders may be obtained as described below.

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An Environmental Management System Agreement (EMSA) is an agreement between the Illinois Environmental Protection Agency (Agency) and a regulated entity. The EMSA allows the regulated entity, referred to as a "sponsor", to implement alternatives to ordinarily applicable environmental laws or regulations. These alternatives should yield greater environmental benefits than would the entity's compliance with ordinarily applicable environmental laws or regulations. The rules set forth the criteria and procedures under which the Board or the Agency may terminate an EMSA without a sponsor's consent (i.e., "involuntarily").

There are two types of involuntary termination: (1) termination of an EMSA by Board order; and (2) termination of an EMSA under Section 52.3-4(b) of the Environmental Protection Act (Act), 415 ILCS 5/52.3-4(b), which the Agency executes without a Board order.

The first type of involuntary termination requires the Agency to request the Board to terminate the EMSA. If the Agency wishes to have the Board terminate an EMSA, the Agency must follow the procedures set forth in the rules besides Section 106.945. See Section 106.940(c). The rules govern the involuntary termination proceedings from the initial filing with the Board through the Board's decision and after the Board enters its final order (e.g., motion to reheat or modify the order). The rules are modeled on the Board's existing Part 103 procedural rules for enforcement proceedings (35 Ill. Adm. Code 103, Subparts A-D). However, the rules have shorter and more specific timeframes, and fewer, or more limited, procedural mechanisms than Part 103.

In the second type of involuntary termination, the Agency may terminate the EMSA without a Board order. The Agency may do so when the sponsor's performance of the EMSA is so deficient that it "prevents achievement" of the purposes of the EMSA program as set forth in Section 52.3-1(b) of the Act. See 415 ILCS 5/52.3-1(b) and 52.3-4(b).

Section 106.945 of the rules addresses the criteria that the Agency must apply to terminate an EMSA under Section 52.3-1(b) of the Act and provides that these terminations may be appealed to the Board in the manner provided for review of permit decisions in Section 40 of the Act, 415 ILCS 5/40. See Sections 106.940(b) and 106.945.

16) Information and questions regarding these adopted amendments shall be directed to:

Richard R. McGill, Jr., Attorney
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, IL 60601
312/814-6983

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Requests for copies of any of the Illinois Pollution Control Board's opinions and orders in R99-9 should be directed to Victoria Ageman at 312-914-3620 or at the above address and should refer to docket R99-9. The full text of the Adopted Amendments begins on the next page:

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TITLE 35: ENVIRONMENTAL PROTECTION

SUBTITLE A: GENERAL PROVISIONS

CHAPTER 1: POLLUTION CONTROL BOARD

PART 106

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Joint or Single Petition

Request to Agency to Join as Co-Petitioner

Contents of Petition

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OLD RULE NUMBERS REFERENCED

APPENDIX A

AUTHORITY: Implementing Sections 5, 14.2(c), 22.4, 27, 28, 28.1, 28.5, 39.5 and 52.3 and authorized by Sections 26, 39.5 and 52.3 of the Environmental Protection Act (415 ILCS 5/5, 14.2(c), 22.4, 27, 28, 28.1, 28.5 and 52.3).

SOURCE: Filed with Secretary of State January 1, 1978; amended at 4 Ill. Reg. 2, P. 186, effective December 27, 1979; codified at 6 Ill. Reg. 835; amended in R85-22 at 10 Ill. Reg. 992, effective February 2, 1986; amended in R86-46 at 11 Ill. Reg. 1345, effective August 4, 1987; amended in R88-1 at 12 Ill. Reg. 1248A, effective July 13, 1988; amended in R88-10 at 12 Ill. Reg. 12817, effective July 21, 1988; amended in R88-5(M) at 13 Ill. Reg. 1294, effective July 10, 1989; amended in R89-24 at 13 Ill. Reg. 9442, effective June 5, 1990; amended in R93-10 at 18 Ill. Reg. 4220, effective July 11, 1994; amended in R93-10 at 18 Ill. Reg. 11579, effective July 11, 1994; amended in R99-9 at 23 Ill. Reg. ~~2697~~ effective ~~1999~~ **FFB 10 1999**.

SUBPART K: INVOLUNTARY TERMINATION OF ENVIRONMENTAL MANAGEMENT SYSTEM

AGREEMENTS (ENMAS)

Section 106.940 Purpose, Applicability

a) The purpose of this Subpart is to set forth the criteria and

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Procedures under which the Board or the Agency may terminate an EMA, as defined in Section 106.942 of this Subpart, when the Agency terminates an EMA under Section 52.3-1(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.

c) This Subpart, except for Section 106.945, applies to proceedings in which the Board will determine whether to terminate an EMA.

(Source: FEB 16 1999 23 Ill. Reg. 269 7 E, effective 2/16/99)

Section 106.942 Definitions

For purposes of this Subpart, the words and terms used in this Subpart have the meanings given below. Words and terms not defined in this Subpart, if defined in the Act, have the meanings that the Act provides.

"Act" means the Environmental Protection Act (415 ILCS 51).

"Agency" means the Environmental Protection Agency.

"Board" means the Pollution Control Board.

"Clerk" means the Clerk of the Board.

"Environmental Management System Agreement" or "EMSA" means the Agreement between the Agency and a sponsor, entered into under Section 52.3 of the Act and 35 Ill. Adm. Code 187, that describes the innovative environmental measures to be implemented, schedules the attainment goals, and mechanisms for accountability.

"Innovative environmental measures" means any procedures, practices, technologies or systems that pertain to environmental management and are expected to improve environmental performance when applied.

"Pilot Project" means an innovative environmental project that covers one or more designated facilities, designed and implemented in the form of an EMSA.

"Sponsor" means the proponent of a pilot project that enters into an EMSA with the Agency.

(Source: Added FEB 16 1999 23 Ill. Reg. 269 7 E, effective 2/16/99)

Section 106.944 Severability

If any provision of this Subpart is adjudged invalid, or if its application does not any person or in any circumstance is adjudged invalid, the invalidity does not

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effect the validity of this Subpart as a whole, or any section, subsection, sentence or clause not adjudged invalid.

b) When the Agency terminates an EMA under Section 52.3-1(b) of the Act, only Sections 106.942 and 106.945 of this Subpart apply.

c) This Subpart, except for Section 106.945, applies to proceedings in which the Board will determine whether to terminate an EMA.

Section 106.945 Termination Under Section 52.3-1(b) of the Act

a) To terminate an EMSA under Section 52.3-1(b) of the Act, the Agency must determine that the sponsor's performance under the EMSA has failed to:

- 1) Achieve emissions reductions or reductions in discharges of wastes beyond the otherwise applicable statutory and regulatory requirements through pollution prevention or other suitable means, or
- 2) Achieve real environmental risk reduction or foster environmental compliance by other persons regulated under this Act in a manner that is clearly superior to the existing regulatory system.

b) If the Agency terminates an EMSA under Section 52.3-1(b) of the Act, the sponsor may, within 35 days after receipt of the Agency's notification of the termination, file an appeal with the Board of Appeals to the Board, will be in the manner provided for review of permit decisions in Section 40 of the Act.

(Source: FEB 16 1999 23 Ill. Reg. 269 7 E, effective 2/16/99)

Section 106.946 Who May Initiate Parties

a) Only the Agency may commence a proceeding to terminate an EMSA under this Subpart.

b) The Agency will be designated the complainant. The sponsor will be designated the respondent.

c) Manner of a party is not a ground for a dismissal; the name of any party may be corrected at any time.

(Source: Added FEB 16 1999 23 Ill. Reg. 269 7 E, effective 2/16/99)

Section 106.948 Notice, Statement of Deficiency, Answer

a) A proceeding to terminate an EMSA will be commenced when the Agency serves a notice of filing and a statement of deficiency upon the respondent and files 10 copies of the notice of filing and statement of deficiency with the Clerk.

b) The statement of deficiency must contain:

- 1) The stated basis for the respondent's alleged deficient

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21. Performance under Section 106.954(a) of this Subpart:
 21.1. The date, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate provisions of the Act or regulations that apply to the pilot project. That the EMA does not address.

21.2. The date, location, nature, extent and duration of any act or omission, and amount and other characteristics of any discharges or emissions, alleged to violate the EMA, and
 21.1.1. With respect to subsections (b)(1) through (b)(3) of this Section, the statement of deficiency must contain sufficient detail to advise the respondent of the extent and nature of the alleged violations to reasonably allow the respondent to prepare a defense.

21.2.1. The respondent must file an answer within 15 days after receipt of the statement of deficiency, unless the Board or the hearing officer extends the 15-day period for good cause. All material allegations of the statement of deficiency will be taken as admitted if not specifically denied by the answer, or if no answer is filed. Any facts that constitute an affirmative defense that would be likely to surprise the complainant must be plainly set forth in the answer before hearing.

(Source: Added at 23 Ill. Reg. 2697⁷₇, effective FEB 16 1999)

Section 106.950. Service

a) The Agency must serve a copy of the notice of filing and statement of deficiency either personally on the respondent or the respondent's authorized agent, or by registered or certified mail with return receipt signed by the respondent or the respondent's authorized agent. Proof must be made by affidavit of the person who makes personal service, or by properly executed registered or certified mail receipt. The Agency must file proof of service of the notice of filing and statement of deficiency with the Clerk immediately upon completion of service.

b) The Agency and the respondent must serve all motions and all other notices personally by First Class United States mail, with sufficient postage, or by overnight delivery by a nationally recognized courier service. The Agency and the respondent must file 10 copies of the motions and notices with the Clerk with proof of service. Service is presumed complete upon personal service, four days after deposit in the United States mail, with sufficient postage, or the next business day upon deposit with a nationally recognized courier service for overnight delivery.

(Source: Added at 23 Ill. Reg. 2697⁷₇, effective FEB 16 1999)

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Section 106.952 Notice of Hearing

a) The Clerk will assign a docket number to each statement of deficiency filed. Any hearing will be held not later than 60 days after the respondent files the answer, subject to any extensions ordered under subsection (c) of this Section.

b) The Chairman of the Board will designate a hearing officer, and the Clerk will notify the parties of the designation. The hearing officer may be a Member of the Board if otherwise qualified.

c) The hearing officer, after reasonable efforts to consult with the parties, will set a time and place for hearing. The Board or the hearing officer may extend the time for hearing if all parties, service or, there are extreme and unavoidable circumstances that warrant a delay. The Board or the hearing officer may delay the hearing more than once. In such event, the Board or the hearing officer will not delay the hearing for more than 30 days.

d) The hearing will be held in the county in which the pilot project is located, or in another county that the hearing officer designates for cause.

e) The hearing officer or the Clerk will give notice of the hearing, at least 30 days before the hearing, to the parties under Section 106.950(b) of this Subpart, and to the public by public advertisement in a newspaper of general circulation in the county in which the pilot project is located.

f) The Agency must give notice of each statement of deficiency and hearing under Section 106.950(b) at least 30 days before the hearing to:
 1) All stakeholders named or listed in the EMA; and
 2) Any person who submitted written comments on the respondent's EMA or participated in the public hearing on the respondent's EMA by signing an attendance sheet or signature card under the procedures set forth in 35 Ill. Adm. Code 187.404. If less than 100 persons attended the public hearing on the respondent's EMA, all indicated by signatures on the attendance sheet or signature card.

g) Failure to comply with this Section is not a defense to an involuntary termination action under this Subpart, but the hearing officer may postpone the hearing upon the motion of any person prejudiced by a failure to comply with this Section.

(Source: Added at 23 Ill. Reg. 2697⁷₇, effective FEB 16 1999)

Section 106.954 Deficient Performance

a) For purposes of this Subpart, a respondent's performance under its

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ENSA is deficient if the Agency asserts and the Board finds that any of the following conditions exist:

- 1) The respondent misrepresented the factual basis for entering into the ENSA.
- 2) The respondent failed to provide access to the pilot project for the Agency to monitor compliance with an ENSA.
- 3) The respondent falsified any monitoring data, recordkeeping information or reports regarding the pilot project.
- 4) The respondent or the owner or operator of the pilot project failed to comply with any requirement of any federal or local environmental law or regulation that applies to the pilot project and that the ENSA does not address, and for which a citizen's complaint has been filed with the Board or the Agency has mailed a notice of violation to the respondent of section 7(a) or (b) of the Act.
- 5) The respondent failed to comply with its ENSA, subject to any grace or cure periods or rights contained in the ENSA.
- 6) Any Board finding of deficient performance under subsection (a)(4) or (a)(5) of this Section will not be binding for any purpose of any other proceeding under the Act, other than under this Subpart.

(Source: Added at 23 Ill. Reg. 269, effective 2/29/95, effective 5/1/95.)

b) Any Board finding of deficient performance under subsection (a)(4) or (a)(5) of this Section will not be binding for any purpose of any other proceeding under the Act, other than under this Subpart.

(Source: Added at 23 Ill. Reg. 269, effective 2/29/95, effective 5/1/95.)

Section 106.956 Board Decision

- a) The Board will prepare a written opinion and order for all final determinations that will include findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law (supported by adequate reasoning) on all material issues.
- b) The Board will render its decision as expeditiously as practicable.

The Board will render a decision as an order that:

- 1) Terminates the ENSA.
- 2) Defers termination for a specified time, not to exceed 90 days from the date of the order, during which the respondent may rectify the deficient performance; or
- 3) Rejects termination of the ENSA.
- 4) The Board may extend the time period under subsection (b)(2) of this section for good cause.

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d) The Board may order any or all of the following to cease and desist from violating the Act:

- 1) Direct the respondent to cease and desist from violating the Act, the Board's Regulations, or the ENSA.
- 2) Require the respondent to provide performance assurance compensation in appropriate amounts.
- 3) Require the respondent to post a sufficient performance bond or other security to assure that the respondent corrects the violation within the time that the Board prescribes.
- 4) Enforce any remedy provision of the ENSA; and
- 5) Order other relief as appropriate.

e) The Clerk will publish the order and opinion with the vote of each Board Member recorded and will notify the parties required to be notified of the hearing from which the order arose of the order and opinion.

(Source: Added at 23 Ill. Reg. 269, effective 2/29/95, effective 5/1/95.)

Section 106.958 Burden of Proof

The Agency has the burden to prove, by a preponderance of the evidence, that there has been deficient performance under the ENSA, as set forth in Section 106.951(a) of this Subpart.

(Source: Added at 23 Ill. Reg. 269, effective 2/29/95, effective 5/1/95.)

Section 106.960 Motions, Responses

a) All motions before a hearing must be presented to the hearing officer at least 10 days before the date of the hearing.

- b) The complainant's motion to voluntarily dismiss an action as to any or all claims must be directed to the Board and may be made orally upon the hearing record, or may be made in writing at any time before the Board issues its decision.
- c) All motions must be served on all parties, including the Agency and its representative and the hearing officer, with proof of service.
- d) Unless made orally on the record during a hearing, or unless the hearing officer directs otherwise, a motion must be in writing, must state the reasons for and grounds upon which the motion is made, and may be accompanied by any affidavits or other evidence relied on and, when appropriate, by a proposed order.
- e) Within 7 days after a written motion is served, or another period that the Board or hearing officer may prescribe, a party may file a response to the motion, accompanied by affidavits or other evidence. If no response is filed, the parties will be deemed to have waived objection to the motion, but the waiver of objection does not bind the Board. The moving party does not have the right to reply, except as

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the hearing officer or the Board permits.

f1. No oral argument will be heard on a motion before the Board unless the Board directs otherwise. A written brief may be filed with a motion or an answer to a motion.

g1. The hearing officer may rule upon all motions, except that the hearing officer has no authority to dismiss, or rule upon a motion to dismiss or decide a proceeding on the merits, or for failure to state a claim or for want of jurisdiction, or to strike any claim or defense for insufficiency or want of proof.

h1. No interlocutory appeal of a motion may be taken to the Board from a ruling of the hearing officer.

i1. After the hearing, the Board may review the hearing officer's rulings. The Board will set aside the hearing officer's ruling only to avoid material prejudice to the rights of a party. The hearing officer, if a member of the Board, may vote upon motions to review his or her rulings as hearing officer.

j1. Unless the Board orders or this Subpart provides otherwise, the filing of a motion will not stay the proceeding or extend the time to perform any act.

Upon timely written application and subject to the need to conduct an orderly and expeditious hearing, the hearing officer will permit a person to intervene in an involuntary termination proceeding under this Subpart if the person submitted written comments on the respondent's ENSA or participated in the public hearing on the respondent's ENSA by signing an attendance card or signature card at hearing under the procedures set forth in 35 Ill. Adm. Code 187.404, or is named or listed in the respondent's ENSA as a stakeholder, and if the Board's final order may adversely affect him or her.

b1. The applicant must file 10 copies of a petition to intervene with the Board, and serve copies on each party not later than 48 hours before the hearing. The hearing officer may permit a person to intervene at any time before the beginning of the hearing when that person shows good cause for the delay.

c1. An intervenor has all the rights of an original party, except that the intervenor is bound by orders issued before the hearing officer permitted the intervenor to intervene and the intervenor cannot raise issues that were raised or were required to be raised at an earlier stage of the proceeding.

(Source: Adopted: (1/19/94) 23 Ill. Reg. 26 (1/15/95), effective 2/15/95)

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Section 106.964 Continuances

The hearing officer will grant a motion to continue an involuntary termination proceeding under this Subpart when justice requires. All motions to continue must be supported by an affidavit or written motion before the hearing officer by the person or persons with knowledge of the facts that support the motion. However, if the Board determines that any involuntary termination proceeding under this Subpart is not proceeding expeditiously, the Board may order actions that it deems appropriate to expedite the proceeding.

(Source: Adopted: (1/19/94) 23 Ill. Reg. 26 (1/15/95), effective 2/15/95)

Section 106.966 Discovery, Admissions

- a1. Discovery, except requests to produce documents, admit facts and state the identity and location of persons with knowledge of facts, as set forth in subsection (b) of this Section, is not permitted unless the hearing officer orders otherwise.
- b1. Regarding any matter not privileged, the hearing officer may order a party to produce documents and to state the identity and location of persons with knowledge of facts upon the written request of any party when parties cannot agree on the legitimate scope of the requests. It is not a ground for objection that the documents will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action.
- c1. The hearing officer may order a party:
 - 1) To state the identity and location of persons with knowledge of relevant facts.
 - 2) To produce evidence that a party controls or possesses so that it may be inspected, copied or duplicated. The order may grant the right to reasonably inspect the pilot project.
- d1. The hearing officer may at any time on his or her own initiative or on motion of any party or witness, make a protective order as Justice requires. The protective order may deny, limit, condition or regulate discovery to prevent unreasonable delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the materials consistent with Sections 7 and 7.1 of the Act.
- e1. All objections to rulings of the hearing officer must be made in the record.
- f1. Section 106.960(d), (e), (f), (g), (h), (i) and (j) of this Subpart applies regarding procedures to rule on objections.
- g1. Failure to comply with any ruling will subject the person to sanctions under 3 Ill. Adm. Code 101, Subpart J.
- h1. Request to admit facts. A party may serve on any other party, no sooner than 15 days after the agency files the statement of deficiency, a written request that the latter admit the truth of any

Section 106.962 Intervention

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specified relevant fact set forth in the request.

1) Request to Admit to the Genuineness of Document. A party may serve on any other party, no sooner than 15 days after the Agency files the statement of deficiency, a written request to admit to the genuineness of any relevant documents described in the request. Copies of the document must be served with the request unless copies have already been furnished.

11) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted, unless, within 15 days after service under subsection (h) or (l) of this Section, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement that denies specifically the matters on which the admission is requested, or that sets forth in detail the reasons why the party cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If a party objects in writing to a part of the request, the remainder of the request must be answered within the period designated in the request. A denial must fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, the party must specify so much of it as is true and deny only the remainder. The hearing officer will hear any objection to a request or to an answer upon prompt notice and motion of the party making the request.

12) Effect of Admission. Any admission made under this Section is for the purpose of the pending action only. It does not constitute an admission by the party for any other purpose and may not be used against the party in any other proceeding.

13) Expenses of Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial in response to the request, and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter of fact, the latter party may apply to the Board for an order under 25 Ill. Adm. Code 101, Subpart J, for payment of reasonable expenses incurred.

(Source: Added: [§ 105.5 at 23 Ill. Reg. 2697, effective [§ 105.5 at 23 Ill. Reg. 2697, effective

Section 106.968 Subpoenas

1) Upon any party's timely motion to the Board, or on motion of the hearing officer or the Board, the hearing officer or the Board may issue a subpoena to attend a hearing. The subpoena may include a command to produce evidence reasonably necessary to resolve the matter under consideration, subject to this Subpart's limitations on

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discovery. A copy of the subpoena must be served upon the Clerk. If the witness, other than a respondent or owner or operator of a pilot project, is a non-resident of the State, the order may provide terms and conditions regarding his or her appearance at the hearing that are just, including payment of his or her reasonable expenses.

b) Every subpoena must state the name of the action and command each person to whom it is directed to attend and give testimony at the time and place specified.

c) The hearing officer or the Board, upon motion made promptly and in any event at or before the time specified for compliance with the subpoena, may quash or modify the subpoena if it is unreasonable and oppressive.

d) Failure of any witness to comply with a Board subpoena will subject the witness to sanctions under 25 Ill. Adm. Code 101, Subpart J.

(Source: Added at 23 Ill. Reg. 2697, effective [§ 105.5 at 23 Ill. Reg. 2697, effective

Section 106.970 Settlement Procedure

a) All parties to any case in which a settlement or compromise is proposed must file with the Clerk before the time of the scheduled hearing a written statement, signed by the parties or their authorized representatives, that outlines the nature of the reasons for and the purpose to be accomplished by the settlement. The statement must contain:

1) A full stipulation of all material facts that pertain to the nature, extent and causes of the alleged violations;

2) The nature of the relevant parties' operations and control equipment;

3) Any explanation for past failures to comply and an assessment of the impact on the public from the failure to comply;

4) Details about future plans for compliance, including a description of additional control measures and the dates on which they will be implemented; and

5) The proposed performance assurance payment, if any.

b) If an agreed settlement is filed under this Section, the Board may dismiss the case without holding a hearing.

(Source: Added: [§ 105.5 at 23 Ill. Reg. 2697, effective [§ 105.5 at 23 Ill. Reg. 2697, effective

Section 106.972 Authority of Hearing Officer, Board Members and Board Assistants

a) The hearing officer has the duty to conduct a fair hearing, to take all necessary action to avoid delay, to maintain order, and to ensure development of a clear and complete record. The hearing officer has

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all powers necessary to these ends including, but not limited to, the authority to:

- 1) Issue discovery orders;
- 2) Rule upon objections to discovery orders;
- 3) Make protective orders as justice requires, which may deny, limit, condition or regulate discovery to prevent unnecessary delay, expense, harassment, or oppression, or to protect materials from disclosure by the party who obtains the materials;
- 4) Administer oaths and affirmations;
- 5) Rule upon offers of proof, receive evidence and rule upon objections to introducing evidence, subject to Section 106.974(b) of this Subpart;
- 6) Regulate the course of the hearings and the conduct of the parties and their counsel;
- 7) Examine witnesses solely to clarify the record of the hearing, when any party is not represented by counsel, the hearing officer may examine and cross-examine any witness to insure a clear and complete record. However, the hearing officer may not exclude exhibits or other testimony because of the examination unless all parties agree; and
- 8) Except as otherwise provided, consider and rule as justice may require upon motions appropriate to an adjudicative proceeding.

Any Board Member or assistant to a Board Member present at the hearing may advise the hearing officer and may interrupt witnesses but does not have the authority to rule on objections or motions or to overrule the hearing officer during the hearing.

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

Section 106.974 Order and Conduct of Hearing

- a) The following will be the order of all involuntary termination hearings under this Subpart, unless modified by the hearing officer for good cause:
 - 1) Present, argue and dispose of preliminary motions on the matters that the statement of deficiency raises;
 - 2) Present opening statements;
 - 3) Complainant's case in chief;
 - 4) Respondent's case in rebuttal;
 - 5) Complainant's case in rebuttal;
 - 6) Statements from interested citizens, as the hearing officer authorizes;
- 7) Complainant's opening argument, which may include legal argument;
- 8) Respondent's closing argument, which may include legal argument;
- 9) Complainant's closing argument, which may include legal argument;
- 10) Present and argue all motions before submitting the transcript to the Board; and

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- 11) A schedule to submit briefs to the Board.
- b) All hearings under this Subpart will be public, and any person not a party and not otherwise a witness for a party may submit written statements relevant to the subject matter of the hearing. Any party may cross-examine any person who submits a statement. If the person is not available to be cross-examined upon timely request, the written statement may be stricken from the record. The hearing officer will permit any person to offer reasonable oral testimony whether or not a party to the proceedings.
- c) All witnesses will be sworn.
- d) At the conclusion of the hearing, the hearing officer will make a statement about the credibility of witnesses. This statement will be based upon the hearing officer's legal judgment and experience and will indicate whether he or she finds credibility to be at issue in the case and, if so, the reasons why. This statement will become a part of the official record and will be transmitted by the hearing officer to each of the parties. No other statement will be made or be appropriate unless the Board orders otherwise.

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

Section 106.976 Evidentiary Matters

The provisions of 35 Ill. Adm. Code 103.204 through 103.210 regarding admissible evidence, written narrative testimony, official notice, viewing premises, admitting business records, examining adverse parties or agents and hostile witnesses and compelling them to appear at hearing, and amendment and variance of pleadings and proof will apply to proceedings under this Subpart.

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

Section 106.978 Post-Hearing Procedures

The provisions of 35 Ill. Adm. Code 103.220 through 103.223 regarding default, transcripts, the record, briefs and oral arguments will apply to proceedings under this Subpart.

(Source: Added at 23 Ill. Reg. 2007-1, effective 1-1-99)

Section 106.980 Motion After Entry of Final Order

Within 35 days after the Board adopts a final order, any party may file a motion to reheat, modify or vacate the order or for other relief. Requests for the motion must be filed within 14 days after the motion is filed. A motion filed within 35 days stays enforcement of the final order.

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(Source: Added: at 23 Ill. Reg. 2697-, effective 7/1/95)

Section 106.982 Relief from Section 106.956 Final Orders

a) The Board may at any time correct errors in orders or other parts of the record that arise from oversight or omission or clerical mistakes. The Board may do so on its own initiative or on the motion of any party and after notice, if any, as the Board orders. During the pendency of an appeal, the Board may correct the mistakes before the appeal is docketed in the appellate court. While the appeal is pending, the Board may correct the mistakes with leave of the appellate court.

b) On motion and upon terms that are just, the Board may relieve a party or a party's legal representative from a final order, for the following:

1) Newly discovered evidence that by due diligence could not have been discovered in time under Section 106.956 of this Subpart; or 2) Fraud (whether previously denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or

3) Void order.

c) A motion under this Section does not affect the finality of a board order or suspend the operation of a board order. The motion must be filed in the same proceeding in which the Board entered the order but the motion is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties must be notified under Section 106.950(b) of this Subpart. This motion must be filed with the Board within 60 days after entry of the order.

(Source: Added: at 23 Ill. Reg. 2697-, effective 7/1/95)JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

SECOND NOTICES RECEIVED

The following second notice was received by the Joint Committee on Administrative Rules during the period of February 9, 1999 through February 16, 1999 and has been scheduled for review by the Committee at its March 16, 1999 meetings in Springfield. Other items not contained in this published list may also be considered. Members of the public wishing to express their views with respect to a rule should submit written comments to the Committee at the following address: Joint Committee on Administrative Rules, 700 Stratton Bldg., Springfield IL 62706.

<u>Second Notice Expires</u>	<u>Agency and Rule</u>	<u>Start Of First Notice</u>	<u>JCAR Meeting</u>
3/25/99	Illinois Housing Development Authority, National Affordable Housing Act (HOME) Program (47 Ill Admin Code 371)	12/11/98	3/16/99
		2/21/99 Reg	2/22/99

A motion under this Section does not affect the finality of a board order or suspend the operation of a board order. The motion must be filed in the same proceeding in which the Board entered the order but the motion is not a continuation of the proceeding. The motion must be supported by affidavit or other appropriate showing as to matters not of record. All parties must be notified under Section 106.950(b) of this Subpart. This motion must be filed with the Board within 60 days after entry of the order.

Rules acted upon during the calendar quarter from Issue 1 through Issue 16 are listed in the Issues Index by Title number, Part number and Issue number. For example, 50 Ill. Adm. Code 2500 are listed in Issue 1 will be listed as 50-2500-1. The letter "R" designates a rule that is being repealed. Inquiries about the Issues Index may be directed to the Administrative Code Division at 217-782-4414 or mailto:ccgce.sas.state.il.us (internet address).

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2-3002-6	77-3004
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